

State Board of Equalization

OPERATIONS MEMO

For Public Release

No: 1160

Date: November 10, 2009

Revised: February 16, 2010

Revised: December 15, 2010

SUBJECT: GUIDELINES FOR PREPARING DUAL DETERMINATION REQUESTS

I. PURPOSE

This operations memo provides guidelines and samples for preparing dual determination requests. The information is meant to standardize dual determination requests. Therefore, it is intended to address the preparation of dual determination requests and not the acceptability of evidence submitted with a timely protest of a determination in an administrative appeal or in civil litigation.

The procedures contained in this memo must be followed; all other existing policies and procedures related to dual determinations remain in effect.

II. BACKGROUND

A dual determination is made against a person for a tax liability that is already the obligation of another person. Dual determinations may be based upon the full amount owed by the other person, or for a portion thereof, depending on the specific circumstances.

III. RESPONSIBILITY

A. District Office (DO), Investigations Division (ID), and Centralized Collection Section (CCS)

DO, ID, and CCS staff are responsible for investigating and preparing the dual determination request for approval. When gathering evidence for a dual determination, the requester should be aware that the burden of proof is on the Board of Equalization (BOE). Therefore, the requester should provide sufficient evidence to support the request.

In most cases, a dual determination request will require issuing an arbitrary account number to one or more of the persons that the dual determination is intended to reach. *It is the responsibility of the DO, ID, or CCS to issue the necessary arbitrary account number before the dual determination request is submitted to the Special Operations Branch (SOB) or Audit Determination and Refund Section (ADRS) for approval.* The District Principal Compliance Supervisor (DPCS), District Principal Auditor (DPA), or their designee must approve the request for a dual determination prior to sending it to the SOB or the

ADRS. For additional procedures on issuing an arbitrary account number, see the Compliance Policy and Procedures Manual section 295.091.

In order to maintain separation of duties and ensure consistency, dual determinations initiated by the DO, ID, or CCS must be sent to either the ADRS or the SOB for review, approval, and billing as detailed below.

B. Audit Determination and Refund Section (ADRS)

ADRS is responsible for reviewing, approving, and billing **all** dual determination requests made under Revenue and Taxation Code (R&TC) section 6829, Responsible Person Liability, and Corporate Suspension. In addition, requests for billing Predecessor's Liability duals received with audit working papers are the responsibility of ADRS.

C. Special Operations Branch (SOB)

Other than the duals listed in section III. B, SOB staff is responsible for reviewing, approving, and billing requests for Questionable Ownership, Unincorporated Entity, and Predecessor's Liability not related to audits.

Prior to ADRS billing a dual, SOB staff will review and address any concerns regarding the situations below within 10 business days. SOB staff will need to expedite their review so that the dual can be issued prior to the statute of limitations expiring in certain instances.

- Assignments for the benefit of creditors.
- Any entity in bankruptcy.
- A criminal intent to evade with a restitution order, or
- Trustee and/or Trustor duals.

IV. REQUIRED

DO, ID, and CCS staff preparing the dual determination request must provide specific information and attach the supporting documentation to expedite approval of the request.

A. R&TC Section 6829 Dual Determination Request

1. Termination of Business

Indicators of the status of the business that may be considered and addressed:

- The close out date of the permit per BOE records.

- The corporation's status with the Secretary of State, if available, since it relates to the R&TC section 6829 requirement that the business activity be discontinued.
- All ACMS and other information that confirms business activity was discontinued in California (e.g., status of the Employment Development Department (EDD) account including close out date if applicable, status of any business license, status of any liquor license, and status of any other indicators pertaining to the operation of the business).

2. **Statute of Limitations**

Subdivision (f) of section 6829 was adopted to apply a specific limitation period for the issuance of a determination based upon section 6829. The DO, ID, and CCS staff must make sure that this limitation period has not expired. Please note that whether the responsible person filed a sales and use tax return in his or her own name is no longer relevant. Rather, the basic rule is that a Notice of Determination issued based upon section 6829 must be mailed within three years after the last day of the calendar month following the quarterly period in which the BOE obtains actual knowledge of the termination, dissolution, or abandonment of the business. However, regardless of when the BOE obtains actual notice, the Notice of Determination must be mailed within eight years after the last day of the calendar month following the quarterly period in which the business terminates. In other words, if the BOE receives actual notice within five years, the basic three-year limitation period applies; otherwise, the eight-year limitation period applies.

3. **Tax Reimbursement (Sales Tax Collected/Use Tax Paid)**

Evidence supporting sales tax collected can be obtained from the following:

- Questionnaires to past employees (may show "responsible person" and sales tax collected).
- Audit working papers.
- Customer affidavits.
- Copies of taxpayer's invoices.
- Copies of sales tax returns showing line 9 deductions claimed, or if the taxpayer e-files returns, obtain copies of the Electronic Filing Revenue Record printed from the BOE e-file system showing a deduction for tax included in total gross sales.

Note: If the taxpayer has registered as an E-Client or has filed its tax return with their express login code, DO, ID, or CCS staff preparing the request for a dual determination can print the "*Electronic Filing Revenue*

Record” by following the instructions provided in the January 31, 2008, Tax Policy Division memo, *New E-file Functionality-Filing History*.

4. **Responsible Party**

Each responsible person should have their own separate paragraphs in the memo that identify the person(s) who managed and directed the business operations or had the duty to do so under the corporation code and the evidence used to come to this conclusion.

If there is more than one responsible party, and the periods for which they are being dualled are different, it should be clearly stated in the person’s respective paragraph which periods are being assessed to each responsible person.

In addition, if the BOE is not pursuing all of the officers of record, a paragraph must be provided explaining why the BOE will not pursue a particular officer, specifically documenting what evidence proves that the officer is not responsible.

5 **Willfulness**

After determining who the responsible person or persons are for the entity, you must then establish whether that person or persons knowingly failed to pay the taxes. That is, were funds available to pay the taxes? Did the responsible person choose instead to make payment to others?

When preparing your evidence to support the dual, you should include documentation establishing willfulness for all liability periods included in the dual request.

Examples of the types of documentation to prove willfulness include:

- Canceled checks.
- Bank statements.
- Third party declarations of amounts received, or
- EDD information as a basis for establishing a liability.

B. All Other Dual Requests

1. Specify the type of dual determination being requested (e.g., Questionable Ownership, Unincorporated Entity, Corporate Suspension, Successor’s Liability, and Predecessor’s Liability). For corporate suspension dual requests, provide information or documentation showing that the corporation is a closely held corporation (see Regulation 1702.6).

2. Include copies of all supporting documentation in the dual request (e.g., invoices, letters, or receipt for payments to suppliers, customers, or landlords).
3. Questionnaire responses received from landlords, CPA, customers, employees, etc. should be attached to the dual request.
4. Include copies of tax returns or electronic filing revenue records as evidence to prove responsible person or sales tax reimbursement.
5. Provide evidence of tax reimbursement for sales tax liabilities if necessary.
6. Provide the correct or current address of the corporate officer/responsible person to whom the dual is to be issued.

C. To create additional consistency in the processing of dual determinations, DO, ID, and CCS staff should:

1. Complete and attach BOE-1512-A, *Checklist for Dual Determinations*, and BOE-1512-B, *Checklist for 6829 or Corporate Suspension Dual Determinations* (**Exhibit A or B**) to the dual request.
2. Follow the format provided in Sample Memos (**Exhibit C or Exhibit D**) when preparing a 6829 or Corporate Suspension dual request. The DPCS or his /her designee must review and sign the request.
3. Complete and attach form BOE-1512, *Dual Liability Billing Worksheet* (**Exhibit E**), for 6829 or Corporate Suspension dual requests to identify the primary account, dual account number(s), and the liability periods.

The required elements listed in the **sample memos** and **checklists** will vary depending on the type of dual determination being requested. Please see the Compliance Policy and Procedures Manual (CPPM) and the Sales and Use Tax District Policy Memos on the eBOE website for additional guidance.

V. OBSOLESCENCE

This operations memo will become obsolete when the information contained herein is incorporated into the appropriate manuals.

Jeffrey L. McGuire
Deputy Director
Sales and Use Tax Department

Distribution: 1-D

Attachments:

| | |
|-----------|---|
| Exhibit A | BOE-1512-A, <i>Checklist for Dual Determinations</i> |
| Exhibit B | BOE-1512-B, <i>Checklist for 6829 or Corporate Suspension Dual Determinations</i> |
| Exhibit C | Request for Corporate Suspension Dual Determination – Sample Memo |
| Exhibit D | Request for 6829 Dual Determination – Sample Memo |
| Exhibit E | BOE-1512, <i>Dual Liability Billing Worksheet</i> |

Exhibit A

BOE-1512-A REV. 1 (07-10)

CHECKLIST FOR DUAL DETERMINATIONS

(Select One of the Listed Duals)☐ **QUESTIONABLE OWNERSHIP DUAL**☐ **UNINCORPORATED ENTITIES**☐ **PREDECESSOR'S LIABILITY**☐ **SUCCESSOR'S LIABILITY**

☐ Books and records of the business (including bank records)☐ Fictitious name filing (County Clerk) and recorded partnership agreement/dissolutions☐ City/County Business License☐ UCC 1 filing with the Secretary of State☐ ABC liquor license registration information☐ Federal and state income tax returns☐ Public utility records☐ Lexis or Accurant reports☐ Names and signatures on tax returns and return checks or the name of the preparer shown on the electronic filing revenue records.☐ Other State agencies: for example, Employment Development Department (EDD), Contractors State License Board (CSLB), Department of Motor Vehicles (DMV), Bureau of Automotive Repair (BAR)☐ BOE-1511, *Dual Determination - Creditor/Supplier/Landlord*☐ Vendor records and receipts held by customers of the business☐ Correspondence in BOE records☐ Secretary of State for corporate status☐ Purchase agreements☐ Background/discussion (ACMS notes)☐ Special note (calculation of any prorated periods, penalty exemption)**Notes:**

Exhibit B

BOE-1512-B REV. 1 (07-10)

**CHECKLIST FOR 6829 OR CORPORATE
SUSPENSION DUAL DETERMINATIONS**

(Select One of the Listed Duals)☐ **6829 DUAL**☐ **CORPORATE SUSPENSION DUAL**

☐ Sales tax reimbursement (collected and failed to pay the tax)☐ Use tax (consumed tangible personal property and failed to pay the tax)☐ Sales tax returns (line 9) or other forms of evidence☐ Electronic filing revenue records showing tax included (if any) in the total gross sales☐ North American Industry Classification System (NAICS) (type of business: for example restaurant)☐ Audit work papers☐ BOE-1508, *Dual Determination Information Request (Officer)*☐ BOE-1509, *Dual Determination Information Request (Employee)*☐ BOE-1510, *Dual Determination - Customer Affidavit*☐ BOE-1511, *Dual Determination - Creditor/Supplier/Landlord*☐ BOE-877, *Request for Corporate/Limited Partnership Info*☐ BOE-847, *Franchise Tax, and Credit Information Request (Individuals. Proof corporation is/was suspended*☐ Ascertain dualee was in charge of filing and paying taxes and other liabilities (sales tax returns, employee income tax returns, corporation income tax returns, bankruptcy statements, or schedules)☐ Background/discussion (ACMS notes)☐ Special note (calculation of any prorated periods, penalty exemption)**Notes:**

Exhibit C***REQUEST FOR CORPORATE SUSPENSION DUAL DETERMINATION******SAMPLE MEMO*****To** : XXXXXXXXXXXXXXXXXXXX**Date:** XXXXXXXXXXXXXXXX

Audit Determination and Refund Section (MIC 39)

From : XXXXXXXXXXXXXXXXXXXX**Subject** : Corporate Suspension Dual Determination**Primary Account:** WXY, Inc.

SR JH 100-xxxxxx

Dualees: Robert Smith (053-00xxxx)

Julia Jones (053-00xxxx)

Dual Periods: 07/01/05 – 09/30/05 (Board Assessed)

04/01/06 – 06/30/06 (Self Assessed)

SYNOPSIS/STATUS

WXY, Inc. made retail sales of tangible personal property from July 2, 2003 to August 9, 2006. As of December 20, 2007, the corporation has an outstanding sales tax debt of \$38,744.43.

Investigative efforts have resulted in evidence that supports the issuance of a dual determination for Corporate Suspension.

Period to be Dualed

The liability periods to be included in their determinations are 07/01/05 – 09/30/05 (Board assessed) and the 04/01/06 – 06/30/06 (self-assessed). The liability period of 07/01/06 – 08/09/06 (Self-assessed) does not qualify for a 6829 determination based on the corporation's 08/09/06 filing of Chapter 7 Bankruptcy (asset), in the Central District of California (06-99999). The Centralized Collection Section also investigated William A. Taylor, Secretary, and deemed there was insufficient evidence to prove he had the ability to direct business operations or to authorize the payment of liabilities.

TERMINATION/SUSPENSION**Is the corporate business suspended? Yes X No ___****If yes, when was it closed and how was this established?**

The BOE seller's permit was closed with an effective date of 08/09/06. Closeout date of business was provided by Mr. Smith, Founder and CEO.

TAX REIMBURSEMENT

Was tax reimbursement included or added to retail sales? Yes X No __

If yes, describe the evidence used to establish tax reimbursement.

Questionnaires were sent to the officers, employees, and CPA/Bookkeeper that were identified during the course of the investigation along with a series of customer affidavits. These efforts did not reveal any direct evidence of tax reimbursement during the liability periods. However, line nine entries on sales tax returns filed prior to the liability periods establish that the corporation's normal operating procedure was to include or add sales tax to their retail sales.

Did the corporation consume tangible personal property and fail to report and pay the use tax? Yes __ No X

If yes, describe the evidence used to establish this failure to report and pay.

RESPONSIBLE PARTY

(Separate paragraph needed for each person)

Who managed and directed business operations, and what evidence was used to come to this conclusion?

Robert Smith, Founder, and CEO:

Mr. Smith was listed as CEO on the SOS database. Mr. Smith was listed as Co-CEO on the Seller's Permit Application. Smith also signed the application as Co-CEO. Mr. Smith was listed as Secretary with ABC. Correspondence from Jerry Jones, attorney of the corporation, identified Mr. Smith as a founder. Mr. Smith was listed as CEO with EDD. Mr. Smith was listed as Agent on the Articles of Incorporation. Mr. Smith signed Sales and Use Tax returns as CEO. ACMS comments confirmed Mr. Smith had knowledge of the corporate liability and had the ability to direct payment. Mr. Smith signed a Power of Attorney as President.

Julia Jones, Founder, Co-CEO and President:

Ms. Jones was listed as Agent on the SOS database. Ms. Jones was listed as Co-CEO on the Seller's Permit Application. Ms. Jones was listed as President/Secretary with ABC. Correspondence from Jerry Jones, attorney of the corporation, identified Ms. Jones as a founder. Ms. Jones was listed as President with EDD. Ms. Jones signed the sales agreement. ACMS comments confirmed that Ms. Jones was aware of the liability and had the ability to direct payment.

CLOSELY HELD

Does the corporation qualify as closely held? Yes X No__

If yes, please explain what information was used to draw this conclusion.

BOE-400 completed at the time the permit was established listed three officers (Mr. Smith, Ms. Jones, and Mr. Taylor). Statement by Domestic Stock Corporation identified only two officers (Mr. Smith and Ms Jones).

EDD inquiry listed wages for only 10 employees. Board contact during the liability period established Mr. Smith and Ms. Jones were the only two corporate officers. There is also no evidence that this was a publicly traded company.

Statute of Limitations:

8-year statute applied to Robert Smith and Julia Jones

Addresses where dual should be mailed:

Julia Jones
5555 Noble Lane
Sacramento, CA 90000

Robert Smith
5555 Noble Lane
Sacramento, CA 90000

Lead Investigator (print name)

Date

Signature

District Reviewer (print name)

Date

Signature

HQ Approver (print name)

Date

Signature

Exhibit D***REQUEST FOR 6829 DUAL DETERMINATION******SAMPLE MEMO*****To** : XXXXXXXXXXXXXXXXXXXX**Date:** XXXXXXXXXXXXXXXX

Audit Determination and Refund Section (MIC 39)

From : XXXXXXXXXXXXXXXXXXXX**Subject** : Request for 6829 Dual Determination**Primary Account:** WXY, Inc.
SR JH 100-xxxxxx**Dualees:** Robert Smith (053-00xxxx)
Julia Jones (053-00xxxx)**Dual Periods:** 07/01/05 – 09/30/05 (Board Assessed)
04/01/06 – 06/30/06 (Self Assessed)**SYNOPSIS**

WXY, Inc. made retail sales of tangible personal property from July 2, 2003 to August 9, 2006. As of December 20, 2007, the corporation has an outstanding sales tax debt of \$38,744.43.

Investigative efforts have resulted in evidence that supports the issuance of a dual determination under the provisions of R&TC section 6829 against Robert Smith and Julia Jones. The corporate liability periods to be included in their determinations are 07/01/05 – 09/30/05 (board assessed) and the 04/01/06 – 06/30/06 (self-assessed). The liability period of 07/01/06 – 08/09/06 (self-assessed) does not qualify for a 6829 determination based on the corporation's 08/09/06 filing of Chapter 7 Bankruptcy (asset), in the Central District of California (06-99999). Centralized Collection Section also investigated William A. Taylor, Secretary, and deemed there was insufficient evidence to prove he had the ability to direct business operations or the payment of liabilities.

TERMINATION**Did the BOE obtain actual knowledge that the business terminated? Yes X No ____****Is the date of actual knowledge within the statute of limitation period based upon R&TC section 6829? Yes X No ____****How was this established?**

The BOE seller's permit was closed with an effective date of 08/09/06. Mr. Smith provided closeout date of business in a letter dated 10/01/06.

TAX REIMBURSEMENT

Was tax reimbursement included or added to retail sales? Yes X No __

If yes, describe the evidence used to establish tax reimbursement.

Questionnaires were sent to the officers, employees, and CPA/Bookkeeper that were identified during the course of the investigation along with a series of customer affidavits. These efforts did not reveal any direct evidence of tax reimbursement during the liability periods. However, line nine entries on returns filed prior to the liability periods establishes that the corporation's normal operating procedure was to include or add sales tax to their retail sales.

Did the corporation consume tangible personal property and willfully fail to report and pay the use tax? Yes __ No X

If yes, describe the evidence used to establish this willful failure to report and pay.

RESPONSIBLE PARTY

(Separate paragraph needed for each person)

Who managed and directed business operations, and what evidence was used to come to this conclusion?

Robert Smith, Founder, and CEO:

Mr. Smith was listed as CEO on the SOS database. Mr. Smith was listed as Co-CEO on the Seller's Permit Application. Smith also signed the application as Co-CEO. Mr. Smith was listed as Secretary with ABC. Correspondence from Jerry Jones, attorney of the corporation, identified Mr. Smith as a founder. Mr. Smith was listed as CEO with EDD. Mr. Smith was listed as Agent on the Articles of Incorporation. Mr. Smith signed Sales and Use Tax returns as CEO. ACMS comments confirmed Mr. Smith had knowledge of the corporate liability and had the ability to direct payment. Mr. Smith signed a Power of Attorney as President.

Julia Jones, Founder, Co-CEO and President:

Ms. Jones was listed as Agent on the SOS database. Ms. Jones was listed as Co-CEO on the Seller's Permit Application. Ms. Jones was listed as President/Secretary with ABC. Correspondence from Jerry Jones, attorney of the corporation, identified Ms. Jones as a founder. Ms. Jones was listed as President with EDD. Ms. Jones signed the sales agreement. ACMS comments confirmed that Ms. Jones was aware of the liability and had the ability to direct payment.

WILLFULNESS

Were funds available to pay the Board during the periods of liability? Yes X No __

If yes, please include quarterly breakdown and explain what funds were available and how they were disbursed.

EDD inquiry listed wages paid employees during the periods of 3Q05 to 2Q06. ABC, Inc, supplier, revealed payments received during the periods of 3Q05 to 3Q06.

Who had knowledge or should have had knowledge of the tax liability as it was being incurred and how was this established?

(Separate paragraph needed for each person)

Robert Smith, Founder and CEO:

This was a small closely held corporation with two active officers during the periods of liability. Mr. Smith also signed the sales and use tax returns and negotiated payment arrangements with the Board.

Julia Jones, Founder, Co-CEO and President:

This was a small closely held corporation with two active officers during the periods of liability. Ms. Jones also sent correspondence to the Board of Equalization and was also involved in the negotiation of payment arrangements.

Who had the authority to act on behalf of the corporation for financial matters and how was this established?

Robert Smith, Founder and CEO

Julia Jones, Founder, Co-CEO and President.

Both officers by virtue of their status within this small closely held corporation had the ability to make financial decisions on behalf of the corporation. This would include matters relating to the payment or nonpayment of sales and use tax. This position is further supported by their promises to pay that were documented in ACMS and the subsequent payments that followed.

Please see the **attached exhibits** for evidence of termination, tax reimbursement, responsibility, and willfulness.

| | | |
|---|---------------|--------------------|
| _____ Lead Investigator (print name) | _____ Date | _____ Signature |
|---|---------------|--------------------|

| | | |
|---|---------------|--------------------|
| _____ District Reviewer (print name) | _____ Date | _____ Signature |
|---|---------------|--------------------|

| | | |
|-----------------------------------|---------------|--------------------|
| _____ HQ Approver (print name) | _____ Date | _____ Signature |
|-----------------------------------|---------------|--------------------|

Exhibit E

BOE-1512 (11-09)

DUAL LIABILITY BILLING WORKSHEET**PRIMARY ACCOUNT**

| | |
|------|----------------|
| NAME | ACCOUNT NUMBER |
|------|----------------|

DUALED ACCOUNTS

| | |
|------|----------------|
| NAME | ACCOUNT NUMBER |
| NAME | ACCOUNT NUMBER |
| NAME | ACCOUNT NUMBER |

TYPE OF DUAL
☐ Corporate Suspension Dual Suspension Date _____ (Please use bill note 266)

☐ 6829 Dual (Please use bill note 540)

☐ Questionable Ownership Dual ☐ Unincorporated Entities

☐ Predecessor's Liability ☐ Successor's Liability

| RETURN LIABILITY(IES) | | PRORATE REQUIRED | | PRORATE PERIOD | |
|-----------------------|----|--------------------------|--------------------------|----------------|----|
| FROM | TO | Yes | No | FROM | TO |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |

| AUDIT LIABILITY(IES) | | PRORATE REQUIRED | | PRORATE PERIOD | |
|----------------------|----|--------------------------|--------------------------|----------------|----|
| FROM | TO | Yes | No | FROM | TO |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |

| CAS LIABILITY(IES) | | PRORATE REQUIRED | | PRORATE PERIOD | |
|--------------------|----|--------------------------|--------------------------|----------------|----|
| FROM | TO | Yes | No | FROM | TO |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |
| | | <input type="checkbox"/> | <input type="checkbox"/> | | |

| | | | |
|--|---------------|---------------------|----------------------|
| Proposed Dual Amount: | Tax: \$ _____ | Int. thru: \$ _____ | Penalty: \$ _____ |
| <input type="checkbox"/> Special Instructions: | | | |
| Periods not subject to dual: | | | |